(3)

No. 88-125

In the Supreme Court of the United States

LEWIS SIMON
and
S-J FINANCIAL CORPORATION
Petitioners,

v.

F/S AIRLEASE II, INC., GREYCAS, INC. and
THE SWIG INVESTMENT COMPANY
AIRCRAFT TRUST NO. 1,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Bankruptcy Code authorize a bankrupt debtor to pay a professional person for services rendered pursuant to 11 U.S.C. Section 503(b)(1)(A) (which authorizes generally the payment of "actual and necessary costs and expenses of preserving the estate") or exclusively pursuant to 11 U.S.C. Section 503(b)(2) (which deals specifically with the compensation of professionals, and incorporates by reference 11 U.S.C. Section 330 and the prior appointment requirements of 11 U.S.C. Section 327(a)?

2. Even if authority to pay professionals can be read into 11 U.S.C. Section 503(b)(1)(A), does it follow that 11 U.S.C. Section 327(a) requiring, *inter alia,* prior court appointment and Bankruptcy Rule 2014(a) requiring, *inter alia,* advance disclosure of proposed fee arrangements, would be inapplicable to a professional person seeking payment under 11 U.S.C. Section 503(b)(1)(a)?

3. Even if authority to pay professionals can be read into 11 U.S.C. Section 503(b)(1)(A), would not such an interpretation apply only to professionals who performed services exclusively after the bankruptcy commenced, and not to professionals with prior dealings with the bankrupt debtor, such as petitioners in this case?

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Respondent F/S Airlease II, Inc., the debtor, concurs with the citations set forth in petitioners' petition for a writ of certiorari, with the exception of the citation to the decision of the Court of Appeals for the Third Circuit. That decision is reported at *844 F.2d 99* (3rd Cir. 1988).

STATEMENT OF THE CASE

The facts as portrayed by the petitioners in their petition for a writ of certiorari contain certain inaccuracies and omissions which are critical to a complete understanding of the questions presented in this case. A closer examination of the record below demonstrates that, rather than being induced to perform services for the debtor by the debtor's officers or attorneys, the petitioners were fully cognizant of the circumstances under which they labored. In addition, the debtor did not admit that the petitioners had a priority claim for $450,000, nor did the debtor admit that the bankruptcy estate has sufficient assets to pay all parties of interest in the bankruptcy in full. Finally, the debtor did not sit idly by while the petitioners purportedly rehabilitated the business, but the debtor labored extensively to preserve the interests of the debtor and creditors.

The alleged "assurances" which the debtor made to petitioner were summarized by Mr. Uhl, the debtor's president, when he testified:

> In fact, it is my recollection that the general tenor of all our discussions with Mr. Simon about his fee ran along the lines of telling Mr. Simon that if, in fact, no new lease were brought here there would be no fee . . . (A. 1335).

The fee that both the petitioners and the debtor were discussing was based upon the remarketing rights granted to the petitioners in a pre-bankruptcy Settlement Agreement dated May 17, 1983, (A. 1106-1112), as amended by two subsequent letter agreements (A. 1665, 1677). In their petition to the bankruptcy court for payment of administrative expenses, the petitioners openly embraced these remarketing rights (A. 345-347), and Mr. Simon further conceded

on cross-examination that he was relying on these contractual rights in support of his claim for compensation in remarketing the aircraft to Aloha Airlines Inc. (A. 1305-1306).

Correspondence concerning the petitioners' fee was conducted between the vice president of the debtor and the petitioners' counsel of record in the present proceeding (A. 1663, 1666-1667, 1668, 1671, 1674, 1676). In addition, the debtor advanced $20,000 for petitioners' expenses to petitioners' counsel, who served as escrow agent for the advance (A. 1668-1670). If the petitioners were induced to remarket the aircraft by the debtor's assurances, how were the petitioners able to require a $20,000 escrow and bargain for the terms and conditions under which the petitioners would perform services? The Third Circuit Court of Appeals decision relied on the fact that Mr. Simon is a sophisticated businessman who was represented by attorneys throughout the course of his dealings with F/S Airlease II, Inc. (844 F.2d at 107).

Mr. Simon continually questioned the debtor's officers about his right to payment of the fee set forth in the May 27, 1983, Settlement Agreement (A. 1250-1251). Mr. Simon actively sought to remarket the aircraft because he had received certain remarketing rights in settlement of his prior lawsuit against F/S Airlease II, Inc. A day before the bankruptcy court's hearing on approval of the debtor's lease with Aloha, petitioners' counsel sought to postpone the resolution of the allocation of lease proceeds, but have the debtor "spread of record" the involvement of the petitioners in the remarketing (A. 792). In light of these circumstances, the Third Circuit Court of Appeals found that the petitioners could not be relieved of their obligation to

see that approval was obtained from the bankruptcy court prior to commencing their services. (844 F.2d at 107).

The petitioners further allege that the debtor "admitted" to a fee of $450,000 and that the petitioners' efforts are the sole reason that a reorganization of the debtor is possible. These statements are inaccurate. The debtor's president testified that the alleged "admission" to a fee of $450,000 (A. 1696-1697) was simply a submission of what the petitioners were asserting as a claim (A. 1345). He further testified that allowance of such a claim would likely result in the inability of the debtor to implement a successful plan of reorganization (A. 1337-1343). Petitioners allege that the debtor conceded that the aircraft's residual value and the Aloha lease proceeds would result in all parties being paid. (Petition at pp. 19-20). In fact, the debtor's president testified in July 1985 that there would be sufficient proceeds only if the creditors' present claims were not paid until 1994. (A. 689-690). The debtor has engaged in extensive negotiations to compromise claims in a fashion so as to permit a viable reorganization (A. 1337-1338). It is the amount of petitioners' claim which has prevented such a reorganization (A. 1343).

Contrary to the conclusions of the Bankruptcy Court (cited by petitioners at P. 24 of their writ for certiorari), the petitioners did not create an estate to be divided by the debtors' attorneys, nor were the petitioners the only parties to work for the debtor's rehabilitation (petitioners' writ at p.7, 33-34). The debtor's attorneys labored extensively before the Bankruptcy Court in Pittsburgh, as well as the Bankruptcy Court in Miami (having jurisdiction over Air Florida's bankruptcy) to preserve the debtor's interest in the aircraft. Air Florida, Greycas (the secured lender) and Heleasco Fifteen, Inc. all sought to foreclose upon all or a

portion of the aircraft and engines (A. 182-185). Were it not for the efforts of debtor's attorneys, there would be no aircraft available for the debtor to lease and no way for the petitioners to have exercised any remarketing rights.

I. The Petitioners Have No Valid Claim Under 11 U.S.C. Section 503(b)(1)(A)

It is asserted in the petitioners' writ of certiorari that they may recover their commission as an administrative expense under 11 U.S.C. Section 503(b)(1)(A).

The cited subsection provides that:

> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—(1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case.

The type of "costs and expenses" contemplated by the statute is not there defined. However, it is clear from the cases discussed below that only *post-petition contracts* entered into by a third party with a bankrupt-debtor can qualify as an administrative expense under Section 503(b)(1)(A). The thrust of this section is to encourage entities who might otherwise be reluctant to deal with a debtor already in bankruptcy to in fact deal with such a debtor by classifying the compensation to be received as a priority administrative expense. Excluded from the scope of this subsection are contracts, such as the May 27, 1983, Settlement Agreement (A. 1106-1112) which were entered into pre-petition with an entity which sometime thereafter filed for bankruptcy.

A leading case (which was advanced by the petitioners at the Circuit Court but does not appear in their present writ) so construing Section 503(b)(1)(A) is *In re Jartran, Inc.*, 732 F.2d 584 (7th Cir. 1984). There, petitioners claiming administrative status under Section 503(b)(1)(A) had entered into a pre-bankruptcy agreement with Jartran. Before all the services were performed, Jartran filed for voluntary bankruptcy and became a debtor-in-possession. Thereafter, petitioners completed their performance under the pre-petition agreement. They demanded their compensation as an administrative expense, arguing that their services were performed post-petition and brought benefit to the bankruptcy estate. The 7th Circuit noted first that:

> The policies underlying the provisions of Section 503 (and its predecessor Section 64(a)(1) of the Bankruptcy Act, 11 U.S.C. Section 104(a)(1)(1976)) are not hard to discern. If a reorganization is to succeed, creditors asked to extend credit after the petition is filed must be given a priority so that they will be moved to furnish the necessary credit to enable the bankrupt to function. 732 F.2d at 586.

The Court then reviewed in detail the petitioners' argument that because the services were rendered post-petition and admittedly brought value to the estate, the claim should be treated as an administrative expense under Section 503(b)(1)(A). The Circuit Court rejected this argument, holding that it was the date of contract, rather than the date of performance, which was controlling despite the receipt of post-petition benefit by the bankruptcy estate. The Court further held that even though petitioners' right to compensation under the agreement was contingent upon their post-petition performance, their right to payment was nevertheless grounded in the pre-

petition contract: As it was therefore a solvent Jartran—and not the debtor-in-possession Jartran—which induced petitioners' agreement, the Court ruled that the case was therefore not within the scope of Section 503(b)(1)(A). *Accord, In re Baths Int'l., Inc.*, 31 B.R. 143 (S.D.N.Y 1983). See also: *In re Freedomland, Inc.*, 419 U.S. 43 (1974); *In re Connecticut Motor Lines, Inc.*, 336 F.2d 96, 101 (3d Cir. 1964); and *Denton & Anderson Co. v. Induction Heating Corp.*, 178 F. 2d 841, 843-844 (2d Cir. 1949), all recognizing that commissions becoming due post-petition on goods delivered post-petition, but ordered prior to bankruptcy, are not entitled to priority status.

The facts set forth in this brief demonstrate that petitioners were not induced to remarket the aircraft, but did so with the intent of retaining the remarketing interest they received in settlement of prior litigation with F/S Airlease II. Petitioners in fact admitted to these circumstances when they alleged in their fee petition that their right to payment resulted from the May 27, 1983, Settlement Agreement (A. 345-347), a contract petitioners entered into with a solvent corporation more than a year prior to the debtor's bankruptcy.[1] Petitioners' performance, allegedly pursuant to the Settlement Agreement, commenced prior to debtor's bankruptcy and continued thereafter. (Petitioners also received their $20,000 expense advance from F/S Airlease II prior to its bankruptcy.) Accordingly, under the reasoning of *Jartran* and its progeny, it is the pre-petition

[1]Indeed, petitioner's right to remarket the aircraft under the Settlement Agreement itself reflects the parties' compromise of a claim for services performed by petitioners in 1980 as to which a dispute had arisen. Clearly, then, these remarketing rights were intended to confer a benefit on petitioners as a form of compensation for services previously rendered. This is far removed from a situation where a bankrupt debtor induces a third party to extend credit post-petition as required by the decisions construing Section 503(b)(1)(A).

date of the Settlement Agreement which is controlling for purposes of Section 503(b)(1)(A), and this is not altered by the fact that part of petitioners' performance occurred after the bankruptcy petition was filed.

The petitioners' contention that the decision of the Third Circuit will have a chilling effect on the involvement of professionals in bankruptcies is also unfounded. Under the rule pronounced in *F/S Airlease II,* all a professional person need do is to see that the debtor files a motion for appointment by the bankruptcy court. Placing the burden on the professional person to assure his court appointment is not a significant burden to place on the professional and does not frustrate any congressional desire concerning the participation of professionals in bankruptcy cases.

Finally, petitioners have proffered a novel reading of Section 503(b)(1)(A) which, if followed, would effectively read Section 365(a) and Section 327(a) out of the Code for the reasons next stated. Such a construction is clearly to be avoided. *Weinberger v. Hynson, Westcott & Dunning,* 412 U.S. 609, 633 (1973) ("[A]ll parts of a statute, if at all possible, are to be given effect."), *Klein v. Republic Steel Corp.,* 435 F.2d 762, 766 (3d Cir. 1970) ("[A]ll . . . provisions of a statute are intended to have meaning and are to be given effect, and . . . the words of a statute are not to be construed as surplusage.").

Section 365(a) governs the assumption of pre-petition contracts which are executory at the time of bankruptcy. By their very nature, such contracts which are assumed by a debtor at or after bankruptcy will of necessity involve both performance by the third party and benefit to the estate in the post-petition period. Therefore, if petitioners' view were carried to its logical conclusion, any pre-petition

contract assumed and performed post-petition would qualify as an administrative expense under Section 503(b)(1)(A), even if the safeguards built into Section 365(a), such as the need for prior court approval, were ignored. *See, e.g., In re Ram Mfg., Inc.*, 38 B.R. 252, 254 (Bkrtcy. E.D. Pa. 1984) (Section 503(b)(1)(A) must be read in light of Section 365).

Similarly, petitioners' argument would lead to the conclusion that any retention of a professional person post-petition would automatically qualify as an administrative expense under Section 503(b)(1)(A), as such a retention would constitute a post-petition contract which confers benefit on the estate. Yet, such a view would have the impermissible consequence of negating Section 327(a) with its legislatively mandated safeguards of prior court approval, disqualification of interested parties to serve, etc. Furthermore, it is plain from the overall scheme of Section 503 that requests for payment by professional persons for claims arising under Section 327(a) cannot be made by means of Section 503(b)(1)(A). A Section 327(a) claim is judged, with respect to the amount of an award, under Section 330(a). All claims under Subsection 327(a)/330(a) must thereafter be presented under Section 503(b)(2), which is a wholly separate and distinct provision from Section 503(b)(1)(A). Therefore, if a given factual situation is one which, as here, falls squarely within the scope of Section 327(a), the existence of a right to administrative expenses in favor of a professional party so retained must be judged exclusively under that section, and not under Section 503(b)(1)(A)[2]

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[2]A reading of the case cited by petitioners in support of their Section 503 argument reveals that the retention of a professional person was not at issue. In *Mammoth Mart* 536 F.2d 950 (1st Cir. 1976),

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Section 503(b)(1)(A) may therefore not be employed as a catch all provision to which resort may be had by claimants who have failed to comply with the express provisions of other applicable statutory provisions. Petitioners' claims here that they were retained as professional persons under Section 327(a) must stand or fall solely by application of those governing provisions.

II. The Court of Appeals Decision in F/S Airlease II, Inc. Does Not Create a Conflict Among the Circuit Courts.

The debtor hereby concurs with and adopts the argument of the respondent, The Swig Investment Company Aircraft Trust No. 1 with regard to its arguments to deny certiorari on this point.

(Continued)
petitioners were former employees claiming severance pay; therefore, this decision did not involve the application of Section 327(a) which, if applicable, would have precluded resort to Section 503(b)(1)(A).

CONCLUSION

For each and all of the foregoing reasons, the respondent F/S Airlease II, Inc., debtor-in-possession, respectfully requests this Court to deny the petitioners' writ of certiorari to the United States Court of Appeals for the Third Circuit.

F/S Airlease II, Inc.
Debtor-in-Possession[3]

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[3]The parent corporation of F/S Airlease II, Inc. is F/S Airlease Corp., which is a wholly owned subsidiary of Chicago Holdings, Inc. The following corporations are affiliates of F/S Airlease II, Inc.

Funding Systems Capital Corporation; Funding Systems Management Corporation; Copyvest Leasing, Inc.; F.S. Leasing, Ltd.; Fundsco Corporation; Funding Systems International Corporation; Funding Systems International GmbH; Equipment Leasing Ventures, Ltd.; G.B.C. Corporation; F.S. Venture Corporation; F/S Marine Transport; CFID Equipment Corporation; F/S Lake Properties, Inc.; Ocwen Inc.; FSC Computer Corp.; Chapel Equipment Services, Inc.; FSV Corporation; Illinois Leasing III, Inc.; Butte, Anaconda & Pacific Railway Company; Illinois Financial, Inc.; Illinois Leasing II, Inc.; Steiner Financial Corporation; Chicago Acquisition Corp.; Chicago Holding Corp.; Illinois Leasing IV, Inc.